

**ASSEMBLY BILL**

**No. 1617**

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**Introduced by Assembly Member DeSaulnier**

February 23, 2007

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An act to add Section 22964 to, and to repeal and add Section 22963 of, the Business and Professions Code, to amend Section 308.1 of the Penal Code, and to repeal Section 30101.7 of the Revenue and Taxation Code, relating to tobacco products.

LEGISLATIVE COUNSEL'S DIGEST

AB 1617, as introduced, DeSaulnier. Tobacco products.

(1) Existing law, the Cigarette and Tobacco Products Tax Law, requires every distributor of cigarettes to pay taxes, as prescribed, on the distribution of cigarettes. In addition to the requirement to pay taxes on the distribution of cigarettes, existing law also requires distributors and wholesalers of cigarette and tobacco products to be licensed by the State Board of Equalization. Existing federal law, known as the Jenkins Act, requires any person that sells or transfers, in interstate commerce, cigarettes into a state that taxes the sale or use of cigarettes to file and report specified information with the tobacco tax administrator of that state.

Existing law prohibits, except under specified circumstances, a retail sale of cigarettes that is not a face-to-face sale, as defined, and prohibits distribution of tobacco products through the mail. Existing law exempts a person from the face-to-face sale restriction, if that person has paid all applicable state taxes and is in compliance with the federal Jenkins Act.

This bill would enact substantially similar provisions relating to tobacco products, including, but not limited to, cigars and pipe tobacco.

The bill would, for cigarettes, as defined, repeal the face-to-face sale requirement, and the related tax reporting provisions, would repeal the prohibitions against distribution through the mail, and would, instead, with certain exceptions, prohibit shipping or transporting of cigarettes to persons in California, and would establish criminal and civil penalties for violation of this prohibition.

(2) Existing law prohibits the offer, sale, distribution, or importation of a tobacco product known as “bidis” or “beedies,” as defined, unless it is sold or intended for sale in business establishments that exclude minors.

This bill would amend the definition of “bidis” or “beedies” to include any product that is marketed and sold as “bidis” or “beedies” and would clarify that persons who violate this prohibition are subject to both criminal and civil liability.

(3) By changing the definition of related crimes, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

1     SECTION 1. The Legislature finds and declares that the  
2     shipment of cigarettes sold via the Internet or by telephone or by  
3     mail order to residents of this state poses a serious threat to public  
4     health, safety, and welfare, and to the economy of the state. The  
5     Legislature also finds that when cigarettes are shipped directly to  
6     a consumer, adequate proof that the purchaser is of legal age cannot  
7     be obtained by the vendor, thereby enabling sellers of cigarettes  
8     to evade provisions of law designed to prevent sales to minors. It  
9     is also the Legislature’s finding that by preventing shipment of  
10    cigarettes directly to consumers, the state will be better able to  
11    measure and monitor cigarette consumption and to better determine  
12    the public health and fiscal consequences of smoking. The  
13    Legislature further finds that preexisting penalties for cigarette  
14    bootlegging have been an inadequate deterrent.

1 SEC. 2. Section 22963 of the Business and Professions Code  
2 is repealed.

3 ~~22963. (a) The distribution or sale of tobacco products directly~~  
4 ~~or indirectly to any person under the age of 18 years through the~~  
5 ~~United States Postal Service or through any other public or private~~  
6 ~~postal or package delivery service at locations, including, but not~~  
7 ~~limited to, public mailboxes and mailbox stores, is prohibited.~~

8 ~~(b) Any person selling or distributing tobacco products directly~~  
9 ~~to a consumer in the state through the United States Postal Service~~  
10 ~~or by any other public or private postal or package delivery service,~~  
11 ~~including orders placed by mail, telephone, facsimile transmission,~~  
12 ~~or the Internet, shall comply with the following provisions:~~

13 ~~(1) (A) Before enrolling a person as a customer or distributing~~  
14 ~~or selling the tobacco product through any of these means, the~~  
15 ~~distributor or seller shall verify that the purchaser is 18 years of~~  
16 ~~age or older. The distributor or seller shall attempt to match the~~  
17 ~~name, address, and date of birth provided by the customer to~~  
18 ~~information contained in records in a database of individuals whose~~  
19 ~~age has been verified to be 18 years or older by reference to an~~  
20 ~~appropriate database of government records kept by the distributor,~~  
21 ~~a direct marketing firm, or any other entity. The distributor or seller~~  
22 ~~shall also verify that the billing address on the check or credit card~~  
23 ~~offered for payment by the purchaser matches the address listed~~  
24 ~~in the database.~~

25 ~~(B) If the distributor or seller is unable to verify that the~~  
26 ~~purchaser is 18 years of age or older pursuant to subparagraph (A),~~  
27 ~~he or she shall require the customer to submit an age-verification~~  
28 ~~kit consisting of an attestation signed by the customer that he or~~  
29 ~~she is 18 years of age or older and a copy of a valid form of~~  
30 ~~government identification. For the purposes of this section, a valid~~  
31 ~~form of government identification includes a driver's license, state~~  
32 ~~identification card, passport, an official naturalization or~~  
33 ~~immigration document, such as an alien registration receipt card~~  
34 ~~(commonly known as a "green card") or an immigrant visa, or~~  
35 ~~military identification. The distributor or seller shall also verify~~  
36 ~~that the billing address on the check or credit card provided by the~~  
37 ~~consumer matches the address listed in the form of government~~  
38 ~~identification.~~

39 ~~(2) The distributor or seller shall impose a two-carton minimum~~  
40 ~~on each order of cigarettes, and shall require payment for the~~

1 purchase of any tobacco product to be made by personal check of  
2 the purchaser or the purchaser's credit card. No money order or  
3 cash payment shall be received or permitted. The distributor or  
4 seller shall submit to each credit card acquiring company with  
5 which it has credit card sales identification information in an  
6 appropriate form and format so that the words "tobacco product"  
7 may be printed in the purchaser's credit card statement when a  
8 purchase of a tobacco product is made by credit card payment.

9 (3) The distributor or seller shall make a telephone call after 5  
10 p.m. to the purchaser confirming the order prior to shipping the  
11 tobacco products. The telephone call may be a person-to-person  
12 call or a recorded message. The distributor or seller is not required  
13 to speak directly with a person and may leave a message on an  
14 answering machine or by voice mail.

15 (4) The distributor or seller shall deliver the tobacco product to  
16 the purchaser's verified billing address on the check or credit card  
17 used for payment. No delivery described under this section shall  
18 be permitted to any post office box.

19 (e) Notwithstanding subdivisions (a) and (b), if a distributor or  
20 seller complies with all of the requirements of this section and a  
21 minor obtains a tobacco product by any of the means described in  
22 subdivision (b), the seller or distributor is not in violation of this  
23 section.

24 (d) For the purposes of the enforcement of this section pursuant  
25 to Section 22958, the acts of the United States Postal Service or  
26 other common carrier when engaged in the business of transporting  
27 and delivering packages for others, and the acts of a person,  
28 whether compensated or not, who transports or delivers a package  
29 for another person without any reason to know of the package's  
30 contents, are not unlawful and are not subject to civil penalties.

31 (e) (1) For the purposes of this section, a "distributor" is any  
32 person or entity, within or outside the state, who agrees to distribute  
33 tobacco products to a customer within the state. The United States  
34 Postal Service or any other public or private postal or package  
35 delivery service are not distributors within the meaning of this  
36 section.

37 (2) For the purpose of this section, a "seller" is any person or  
38 entity, within or outside the state, who agrees to sell tobacco  
39 products to a customer within the state. The United States Postal

1 ~~Service or any other public or private postal or package delivery~~  
2 ~~service are not sellers within the meaning of this section.~~

3 ~~(3) For the purpose of this section, a “carton” is a package or~~  
4 ~~container that contains 200 cigarettes.~~

5 ~~(f) A district attorney, city attorney, or the Attorney General~~  
6 ~~may assess civil penalties against any person, firm, corporation,~~  
7 ~~or other entity that violates this section, according to the following~~  
8 ~~schedule:~~

9 ~~(1) A civil penalty of not less than one thousand dollars (\$1,000)~~  
10 ~~and not more than two thousand dollars (\$2,000) for the first~~  
11 ~~violation.~~

12 ~~(2) A civil penalty of not less than two thousand five hundred~~  
13 ~~dollars (\$2,500) and not more than three thousand five hundred~~  
14 ~~dollars (\$3,500) for the second violation.~~

15 ~~(3) A civil penalty of not less than four thousand dollars (\$4,000)~~  
16 ~~and not more than five thousand dollars (\$5,000) for the third~~  
17 ~~violation within a five-year period.~~

18 ~~(4) A civil penalty of not less than five thousand five hundred~~  
19 ~~dollars (\$5,500) and not more than six thousand five hundred~~  
20 ~~dollars (\$6,500) for the fourth violation within a five-year period.~~

21 ~~(5) A civil penalty of ten thousand dollars (\$10,000) for a fifth~~  
22 ~~or subsequent violation within a five-year period.~~

23 SEC. 3. Section 22963 is added to the Business and Professions  
24 Code, to read:

25 22963. (a) It is unlawful for any person engaged in the business  
26 of selling or distributing cigarettes to ship or cause to be shipped  
27 any cigarettes to any person in this state who is not any of the  
28 following:

29 (1) Licensed pursuant to Division 8.6 (commencing with Section  
30 22970).

31 (2) An export warehouse proprietor pursuant to Chapter 52 of  
32 the Internal Revenue Code (26 U.S.C. Sec. 5701 et seq.).

33 (3) An operator of a customs bonded warehouse pursuant to  
34 Section 1311 or 1555 of Title 19 of the United States Code.

35 (4) A person who is an officer, employee, or agent of the federal  
36 government, or of this state or of a department, agency,  
37 instrumentality, or political subdivision of the federal government  
38 or this state, when the person is acting in accordance with his or  
39 her official duties.

(b) It is unlawful for any common or contract carrier to knowingly transport cigarettes to any person in this state reasonably believed by the carrier to be other than a person described in subdivision (a). It is unlawful for any other person to knowingly, or with reason to know, transport cigarettes to any person in this state, other than a person described in subdivision (a), except that this subdivision shall not be construed to prohibit a person other than a common or contract carrier from transporting 800 or fewer cigarettes at any one time to any adult in this state.

(c) When a person engaged in the business of selling or distributing cigarettes ships or causes to be shipped any cigarettes to any person in this state, other than in the cigarette manufacturer's original container or wrapping, the container or wrapping shall be plainly or visibly marked with the term "cigarettes."

(d) Notwithstanding any other provision of this division, upon discovery by the State Board of Equalization or a law enforcement agency of any cigarettes that have been, or are being, shipped or transported in violation of this section, the board or the law enforcement agency may seize and take possession of the cigarettes. Any cigarettes seized by a law enforcement agency shall be delivered to the board, or its designee, within seven days, unless the cigarettes will be destroyed by that law enforcement agency, or unless the cigarettes are otherwise required to be used as evidence in an administrative, criminal, or civil proceeding, or as part of an ongoing law enforcement operation. Any cigarettes seized by the board or delivered to the board by a law enforcement agency shall be deemed forfeited and the board shall comply with procedures set forth in Chapter 7.5 (commencing with Section 30435) of Part 13 of Division 2 of the Revenue and Taxation Code.

(e) (1) A violation of this section is a misdemeanor and shall be subject to the following penalties:

(A) Upon the first violation, a fine of not more than one thousand dollars (\$1,000).

(B) Upon the second violation, a fine of not more than five thousand dollars (\$5,000) and imprisonment not to exceed three months.

(C) Upon the third violation or subsequent violations, a fine of not more than twenty-five thousand dollars (\$25,000) and imprisonment not to exceed six months.

(2) In addition to the criminal penalty, the Attorney General, district attorney, or city attorney may bring a civil action against any person, firm, corporation, or other entity that violates this section. If a court determines that this section has been violated, the court shall assess civil penalties not to exceed five thousand dollars (\$5,000) per violation, plus the costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and court costs.

(f) For the purposes of this section, "cigarette" has the same meaning as in paragraph (3) of subdivision (a) of Section 30165.1 of the Revenue and Taxation Code and implementing regulations.

SEC. 3.5. Section 22964 is added to the Business and Professions Code, to read:

22964. (a) The distribution or sale of tobacco products directly or indirectly to any person under the age of 18 years through the United States Postal Service or through any other public or private postal or package delivery service at locations, including, but not limited to, public mailboxes and mailbox stores, is prohibited.

(b) Any person selling or distributing tobacco products directly to a consumer in the state through the United States Postal Service or by any other public or private postal or package delivery service, including orders placed by mail, telephone, facsimile transmission, or the Internet, shall comply with the following provisions:

(1) (A) Before enrolling a person as a customer or distributing or selling tobacco products through any of these means, the distributor or seller shall attempt to match the name, address, and date of birth provided by the customer to information contained in records in a database of individuals whose age has been verified to be 18 years or older by reference to an appropriate database of government records kept by the distributor, a direct marketing firm, or any other entity. The distributor or seller shall also verify that the billing address on the check or credit card offered for payment by the purchaser matches the address listed in the database.

(B) If the distributor or seller is unable to verify that the purchaser is 18 years of age or older pursuant to subparagraph (A), he or she shall require the customer to submit an age-verification kit consisting of an attestation signed by the customer that he or she is 18 years of age or older and a copy of a valid form of government identification, which includes a driver's license, state

1 identification card, passport, an official naturalization or  
2 immigration document, such as an alien registration receipt card  
3 (commonly known as a “green card”) or an immigrant visa, or  
4 military identification. The distributor or seller shall also verify  
5 that the billing address on the check or credit card provided by the  
6 consumer matches the address listed in the form of government  
7 identification.

8 (2) The distributor or seller shall require payment for the  
9 purchase of any tobacco products to be made by personal check  
10 of the purchaser or the purchaser’s credit card. No money order  
11 or cash payment shall be received or permitted. The distributor or  
12 seller shall submit to each credit card acquiring company with  
13 which it has credit card sales identification information in an  
14 appropriate form and format so that the words “tobacco product”  
15 may be printed in the purchaser’s credit card statement when a  
16 purchase of tobacco products is made by credit card payment.

17 (3) The distributor or seller shall make a telephone call after 5  
18 p.m. to the purchaser confirming the order prior to shipping the  
19 tobacco products. The telephone call may be a person-to-person  
20 call or a recorded message. The distributor or seller is not required  
21 to speak directly with a person and may leave a message on an  
22 answering machine or by voice mail.

23 (4) The distributor or seller shall deliver the tobacco products  
24 to the purchaser’s verified billing address on the check or credit  
25 card used for payment. No delivery described under this section  
26 shall be permitted to any post office box.

27 (c) Notwithstanding subdivisions (a) and (b), if a distributor or  
28 seller complies with all of the requirements of this section and a  
29 minor obtains tobacco products by any of the means described in  
30 subdivision (b), the seller or distributor is not in violation of this  
31 section.

32 (d) For the purposes of the enforcement of this section pursuant  
33 to Section 22958, the acts of the United States Postal Service or  
34 other common carrier when engaged in the business of transporting  
35 and delivering packages for others, and the acts of a person,  
36 whether compensated or not, who transports or delivers a package  
37 for another person without any reason to know of the package’s  
38 contents, are not unlawful and are not subject to civil penalties.

39 (e) (1) For the purposes of this section, “tobacco products”  
40 includes any form of smoking tobacco, cigars, pipe tobacco,



1 smokeless tobacco, chewing tobacco, snuff, or any other article  
2 or product containing tobacco, but does not include cigarettes as  
3 defined in subdivision (a) of Section 30165.1 of the Revenue and  
4 Taxation Code and implementing regulations.

5 (2) For the purposes of this section, a “distributor” is any person  
6 or entity, within or outside the state, who agrees to distribute  
7 tobacco products to a customer within the state. The United States  
8 Postal Service or any other public or private postal or package  
9 delivery service are not distributors within the meaning of this  
10 section.

11 (3) For the purpose of this section, a “seller” is any person or  
12 entity, within or outside the state, who agrees to sell tobacco  
13 products to a customer within the state. The United States Postal  
14 Service or any other public or private postal or package delivery  
15 service are not sellers within the meaning of this section.

16 (f) A district attorney, city attorney, or the Attorney General  
17 may assess civil penalties against any person, firm, corporation,  
18 or other entity that violates this section, according to the following  
19 schedule:

20 (1) A civil penalty of not less than one thousand dollars (\$1,000)  
21 and not more than two thousand dollars (\$2,000) for the first  
22 violation.

23 (2) A civil penalty of not less than two thousand five hundred  
24 dollars (\$2,500) and not more than three thousand five hundred  
25 dollars (\$3,500) for the second violation.

26 (3) A civil penalty of not less than four thousand dollars (\$4,000)  
27 and not more than five thousand dollars (\$5,000) for the third  
28 violation within a five-year period.

29 (4) A civil penalty of not less than five thousand five hundred  
30 dollars (\$5,500) and not more than six thousand five hundred  
31 dollars (\$6,500) for the fourth violation within a five-year period.

32 (5) A civil penalty of not less than seven thousand dollars  
33 (\$7,000) for a fifth or subsequent violation within a five-year  
34 period.

35 SEC. 4. Section 308.1 of the Penal Code is amended to read:

36 308.1. (a) Notwithstanding any other provision of law, no  
37 person shall sell, offer for sale, distribute, or import any tobacco  
38 product commonly referred to as “bidis” or “beedies,” unless that  
39 tobacco product is sold, offered for sale, or intended to be sold in

1 a business establishment that prohibits the presence of persons  
2 under 18 years of age on its premises.

3 (b) For purposes of this section, “bidis” or “beedies” means ~~a~~  
4 *any of the following*:

5 (1) A product containing tobacco that is wrapped in temburni  
6 leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*).

7 (2) *A product that is marketed and sold as “bidis” or “beedies.”*

8 (c) Any person who violates this section is guilty of a  
9 misdemeanor ~~or and is also~~ subject to a civil action brought by  
10 the Attorney General, a city attorney, county counsel, or district  
11 attorney for an injunction and a civil penalty of up to two thousand  
12 dollars (\$2,000) per violation. This subdivision does not affect any  
13 other remedies available for a violation of this section.

14 SEC. 5. Section 30101.7 of the Revenue and Taxation Code  
15 is repealed.

16 ~~30101.7. (a) It is the intent of the Legislature in enacting this~~  
17 ~~section to facilitate the collection of all applicable state surtaxes~~  
18 ~~and sales or use taxes on cigarettes sold to residents of the state.~~

19 ~~(b) Except as provided in subdivision (d), no person may engage~~  
20 ~~in a retail sale of cigarettes in California unless the sale is a~~  
21 ~~vendor-assisted, face-to-face sale.~~

22 ~~(c) For the purposes of this section, “face-to-face sale” means~~  
23 ~~a sale in which the purchaser is in the physical presence of the~~  
24 ~~seller or the seller’s employee or agent at the time of the sale. A~~  
25 ~~face-to-face sale does not include any transaction conducted by~~  
26 ~~mail order, the Internet, telephone, or any other anonymous~~  
27 ~~transaction method in which the buyer is not in the seller’s physical~~  
28 ~~presence or the physical presence of the seller’s employee or agent~~  
29 ~~at the time of the sale.~~

30 ~~(d) A person may engage in a non-face-to-face sale of cigarettes~~  
31 ~~to a person in California provided that both of the following~~  
32 ~~conditions are met:~~

33 ~~(1) The seller has fully complied with all of the requirements~~  
34 ~~of Chapter 10A (commencing with Section 375) of Title 15 of the~~  
35 ~~United States Code, otherwise known as the Jenkins Act.~~

36 ~~(2) The seller has fully complied with either of the following~~  
37 ~~requirements:~~

38 ~~(A) All applicable California taxes on the cigarettes have been~~  
39 ~~paid.~~

1     ~~(B) The seller includes on the outside of the shipping container~~  
2     ~~for any cigarettes shipped to a resident in California from any~~  
3     ~~source in the United States an externally visible and easily legible~~  
4     ~~notice located on the same side of the shipping container as the~~  
5     ~~address to which the package is delivered stating as follows:~~

6     ~~—“IF THESE CIGARETTES HAVE BEEN SHIPPED TO~~  
7     ~~YOU FROM A SELLER LOCATED OUTSIDE OF THE~~  
8     ~~STATE IN WHICH YOU RESIDE, THE SELLER HAS~~  
9     ~~REPORTED PURSUANT TO FEDERAL LAW THE SALE~~  
10    ~~OF THESE CIGARETTES TO YOUR STATE TAX~~  
11    ~~COLLECTION AGENCY, INCLUDING YOUR NAME~~  
12    ~~AND ADDRESS. YOU ARE LEGALLY RESPONSIBLE~~  
13    ~~FOR ALL APPLICABLE UNPAID STATE TAXES ON~~  
14    ~~THESE CIGARETTES.”~~

15    ~~(e) The State Board of Equalization shall provide information~~  
16    ~~relative to a seller’s failure or attempt to comply with the Jenkins~~  
17    ~~Act to the Attorney General.~~

18    ~~(f) The Attorney General or a city attorney, county counsel, or~~  
19    ~~district attorney may bring a civil action to enforce this section~~  
20    ~~against any person that violates this section and, in addition to any~~  
21    ~~other remedies provided by law, the court shall assess a civil~~  
22    ~~penalty in accordance with the following schedule:~~

23    ~~(1) A civil penalty of not less than one thousand dollars (\$1,000)~~  
24    ~~and not more than two thousand dollars (\$2,000) for the first~~  
25    ~~violation.~~

26    ~~(2) A civil penalty of not less than two thousand five hundred~~  
27    ~~dollars (\$2,500) and not more than three thousand five hundred~~  
28    ~~dollars (\$3,500) for the second violation within a five-year period.~~

29    ~~(3) A civil penalty of not less than four thousand dollars (\$4,000)~~  
30    ~~and not more than five thousand dollars (\$5,000) for the third~~  
31    ~~violation within a five-year period.~~

32    ~~(4) A civil penalty of not less than five thousand five hundred~~  
33    ~~dollars (\$5,500) and not more than six thousand five hundred~~  
34    ~~dollars (\$6,500) for a fourth violation within a five-year period.~~

35    ~~(5) A civil penalty of ten thousand dollars (\$10,000) for a fifth~~  
36    ~~or subsequent violation within a five-year period.~~

37    ~~(g) The Attorney General shall provide an annual report to the~~  
38    ~~Legislature regarding all actions taken to comply with, and enforce,~~  
39    ~~the Jenkins Act.~~

1     ~~(h) This section does not prohibit any lawful sale of a tobacco~~  
2     ~~product that occurs by means of a vending machine.~~

3     ~~(i) Nothing in this section shall relieve the seller of cigarettes~~  
4     ~~from any other applicable requirement of state law relating to the~~  
5     ~~sale of cigarettes.~~

6     ~~(j) The provisions of this section are severable. If any provision~~  
7     ~~of this section or its application is held invalid, that invalidity shall~~  
8     ~~not affect other provisions or applications that can be given effect~~  
9     ~~without the invalid provision or application.~~

10     SEC. 6. No reimbursement is required by this act pursuant to  
11     Section 6 of Article XIII B of the California Constitution because  
12     the only costs that may be incurred by a local agency or school  
13     district will be incurred because this act creates a new crime or  
14     infraction, eliminates a crime or infraction, or changes the penalty  
15     for a crime or infraction, within the meaning of Section 17556 of  
16     the Government Code, or changes the definition of a crime within  
17     the meaning of Section 6 of Article XIII B of the California  
18     Constitution.